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5                                                        ***E-FILED - 10/15/08***

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9                      IN THE UNITED STATES DISTRICT COURT

10                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

11  SHEDRICK HENRY,                       )      No. C 98-21093-RMW (PR)
                                          )
12                    Petitioner,         )      ORDER DENYING
                                          )      PETITIONER'S MOTION FOR
13      vs.                               )      RECONSIDERATION
                                          )
14  GARY LINDSEY, Warden,                 )
                                          )      (Docket No. 10)
15                    Respondent.         )
    _____)

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18        Petitioner, a California prisoner, filed a <u>pro se</u> petition for writ of habeas corpus pursuant

19  to 28 U.S.C. § 2254.  On December 2, 1998, the court sua sponte dismissed the case without

20  prejudice for failure to exhaust and instructed petitioner that he could resubmit his petition after

21  exhausting state remedies (docket no. 4).  Subsequently, petitioner began exhausting his state

22  remedies eight months later and filed a state habeas petition in California Superior Court on

23  August 31, 1999.  Mot. at 2.  He continued exhausting his state remedies through the California

24  courts until ultimately, California Supreme Court denied his petition on April 25, 2001.  Mot. at

25  3.  Thereafter, he filed another section 2254 petition in district court on December 5, 2001,

26  which was subsequently dismissed as untimely on March 31, 2004.  Mot. at 3.  The Ninth Circuit

27  affirmed the dismissal on August 4, 2005.  See <u>Henry v. Lamarque</u>, No. 04-16028 (9th Cir. Aug.

28  1, 2005) (unpublished disposition).

Order Denying Petitioner's Motion for Reconsideration
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1      On April 14, 2008, petitioner filed this motion for reconsideration asking the court for

2  relief from its 1998 judgment because the court failed to advise him that he had the option of

3  striking his unexhausted claims and proceeding on his petition before dismissal.  Petitioner also

4  claims that for that reason, he is entitled to equitable tolling and the court should allow him to

5  file a new petition that relates back to his original petition.  For the reasons set forth below, the

6  court denies petitioner's motion for reconsideration.

7                                                        **DISCUSSION**

8      Where the court's ruling has resulted in a final judgment or order, Rule 60(b) provides

9  for reconsideration where one or more of the following is shown: (1) mistake, inadvertence,

10  surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not

11  have been discovered before the court's decision; (3) fraud by the adverse party; (4) the

12  judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief.  Fed.

13  R. Civ. P. 60(b); School Dist. 1J v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).  Here,

14  petitioner files his motion based on Rule 60(b)(6), the catch-all provision.

15      A party is entitled to relief under Rule 60(b)(6) where "extraordinary circumstances

16  prevented [him] from taking timely action to prevent or correct an erroneous judgment."

17  Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997) (citations and quotation marks

18  omitted).  Rule 60(b)(6) is to be used "sparingly [and] as an equitable remedy to prevent

19  manifest injustice."  United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th

20  Cir. 1993). Further, Rule 60(b) expressly limits the time within which a motion for relief from

21  judgment may be made.  Motions based on "any other reason justifying relief from the operation

22  of the judgment," Fed. R. Civ. P. 60(b)(6), must be made "within a reasonable time."  Fed. R.

23  Civ. P. 60(b).  "What constitutes 'reasonable time' depends upon the facts of each case, taking

24  into consideration the interest in finality, the reason for the delay, the practical ability of the

25  litigant to learn earlier of the grounds relied upon, and prejudice to other parties."  Ashford v.

26  Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

27      Here, petitioner's petition was filed on October 30, 1998.  The order dismissing the

28  petition was entered on December 2, 1998.  Petitioner elected not to file a notice of appeal.

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1   After exhausting his state remedies, he waited over seven months to re-file his habeas petition in

2   2001. On appeal from the 2004 dismissal of petitioner's section 2254 petition as untimely, the

3   Ninth Circuit considered and rejected the same issue petitioner raises in the instant motion, but

4   in the context of an equitable tolling argument.  After the Ninth Circuit's affirmance, petitioner

5   waited an additional two and half years before filing the instant reconsideration motion.

6   Petitioner gives no reason for the significant delays, and it is clear that he had learned of the

7   claim raised in this motion as early as 2001.  Id.  Accordingly, the court denies petitioner's

8   motion as untimely because petitioner failed to move for reconsideration within a reasonable

9   time.

10          Further, a movant seeking relief under Rule 60(b)(6) is required to show "extraordinary

11  circumstances" justifying the reopening of a final judgment.  Gonzalez v. Crosby, 545 U.S. 524,

12  125 S.Ct. 2641, 2649 (2005).  "Such [extraordinary] circumstances will rarely occur in the

13  habeas context."  Id.  Petitioner has not demonstrated that "extraordinary circumstances

14  prevented [him] from taking timely action to prevent or correct" the judgment.  Hamilton v.

15  Newland, 374 F.3d 822, 825 (9th Cir. 2004) (quoting Greenawalt v. Stewart, 105 F.3d 1268,

16  1273 (9th Cir. 1997)).  Petitioner alleges no "change of circumstances between the time when

17  [he] filed his habeas petition and the time when he filed his 60(b) motion" that justifies relief.

18  Id.  His delay in raising his current motion "may be attributable to inattention or inexperience but

19  neither deficiency constitutes an 'extraordinary circumstance' that justifies Rule 60(b) relief."

20  Greenawalt, 105 F.3d at 1273.  Circumstances have not changed apart from petitioner's belated

21  attempt to argue a legal theory he raised or should have raised earlier.  Accordingly, the court

22  concludes that petitioner cannot demonstrate extraordinary circumstances sufficient to grant

23  reconsideration.

**CONCLUSION**

25          The motion for reconsideration is DENIED.  This order terminates docket no. 10.

26          IT IS SO ORDERED.

27  DATED: __10/10/08__

*Ronald M. Whyte*

RONALD M. WHYTE
United States District Judge

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